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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, DC 20554

Re: Notice of *Ex Parte* in WC Docket No. 17-108, Restoring Internet Freedom

Dear Ms. Dortch:

In accordance with the Commission's rules[1] please accept this notice of an *ex parte* presentation by representatives from higher education and research library organizations in connection with the above-captioned proceedings.[2] On Friday, October 6, 2017, Jon Fansmith, Director of Government Relations, American Council on Education, Jarret Cummings, Director of Policy and Government Relations, EDUCAUSE, Jessica Sebeok, Associate Vice President and Counsel for Policy, Association of American Universities, Chris Libertelli, Esq. from the Venture Policy Group on behalf of the Association of Research Libraries, and undersigned counsel, met with the following individuals: Madeleine Findley, Deputy Bureau Chief, Wireline Competition Bureau (WCB), Betsy McIntyre, Deputy Chief, Wireless Telecommunications Bureau (WTB), Daniel Kahn, Chief, WCB Competition Policy Division, Melissa Kirkel, Assistant Chief, WCB Competition Policy Division, Joseph Calascione, Legal Advisor, WCB, Ramesh Nagarajan, WCB, Jerusha Burnett, Consumer and Governmental Affairs Bureau, and Jiaming Shang, WTB.

We discussed why an open Internet supported through enforceable net neutrality rules is critical to the educational, research and public service missions of higher education institutions and research libraries. Not only do our staff, students and researchers utilize the Internet for their

[1] 47 C.F.R. § 1.1206.

[2] *See* Joint comments and reply comments of the American Association of Community Colleges (AACC), the American Association of State Colleges and Universities (AASCU), the American Council on Education (ACE), the Association of American Universities (AAU), the Association of Public and Land-grant Universities (APLU), the Association of Research Libraries (ARL), EDUCAUSE, the National Association of College and University Business Officers (NACUBO), and the National Association of Independent Colleges and Universities (NAICU) available at https://ecfsapi.fcc.gov/file/1071799489959/201707%20Higher%20Ed%20Net%20Neutrality%20Comments%20(AS%20FILED).pdf; https://ecfsapi.fcc.gov/file/1083094796388/201708%20Higher%20Ed%20Net%20Neutrality%20Reply%20Comments%20(AS%20FILED).pdf; separate reply comments filed by ARLare availalble here: https://ecfsapi.fcc.gov/file/108292560826123/Reply-Comments-Net-Neutrality%20FINAL.pdf. A description of each organization is available in Appendix A of our initial comments.

work, as edge providers our organizations deliver media-rich, interactive content for online education and extension services supporting industrial and agricultural activities in and beyond our local communities. As non-profit, non-commercial providers of these edge services, our organizations cannot afford to pay for priority access and should not be asked to compete financially with commercial edge providers for such access.

We reiterated our organizations' strong preference for maintaining current rules applicable to both fixed and wireless broadband supported by Title II, and our belief that reclassification of public broadband Internet access (BIAS) service will be disruptive and is unnecessary. We also noted our support for the Commission's recent and continued recognition that "shared use arrangements" such as R&E networks represent private carriage.[3]

In the event the Commission does reclassify public broadband Internet access as a Title I service, we discussed our belief that existing no blocking and no throttling rules can be supported under Section 706 by following the "roadmap" established by the Verizon court.[4] We noted that many commenters including large ISPs such as AT&T and Verizon supported this reading of Section 706.[5] In our comments we proposed a minor change to the existing no-blocking/no-throttling rules that we believe would make them consistent with the *Verizon* decision.[6]

With respect to paid priority, we discussed employing an "Internet reasonable" conduct standard that would establish rebuttable presumptions against certain types of conduct, including paid priority, which undermine an open Internet.[7] An Internet reasonable conduct standard would

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[3] *See Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, Report and Order, 32 FCC Rcd 3459, 3580, ¶ 285 (2017).

[4] Relevant language from the *Verizon* decision includes: "Thus, if the relevant service that broadband providers furnish is access to their subscribers generally, as opposed to access to their subscribers at the specific minimum speed necessary to satisfy the anti-blocking rules, then these rules, while perhaps establishing a lower limit on the forms that broadband providers' arrangements with edge providers could take, might nonetheless leave sufficient 'room for individualized bargaining and discrimination in terms' so as not to run afoul of the statutory prohibitions on common carrier treatment." *See Verizon vs. FCC*, 740 F.3d 623, 658 (DC Cir. 2014) (emphasis added).

[5] *See AT&T Comments* at 101-03; *id.* at 105 ("the [DC Circuit in *Verizon*] held that section 706 affirmatively authorizes the Commission to adopt a no-blocking/no-throttling rule in the absence of a conflict with some other provision of law") (citation omitted); *Verizon Comments* at 18 ("[T]he D.C. Circuit has held that Section 706 . . . affords the Commission some authority to adopt rules pertaining to the open Internet."). AT&T and Verizon support these rules with respect to fixed broadband only.

[6] "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block an end user from accessing lawful content, applications, services, or non-harmful devices, subject to reasonable network management." *See* 47 CFR § 8.5 (no blocking); 47 C.F. R. § 8.7 (no throttling). As discussed, the proposed revised rule effectively regulates only those services that ISPs voluntarily render to end users. Thus the revised rule would not require ISPs to provide free service to all edge providers (which the *Verizon* court found, among other things, created a common carrier relationship).

[7] Our proposed list of presumed violations of an Internet reasonable standard include:

- Requiring permission to provide new services (Innovation without Permission)
- Paid-prioritization
- Undermining the Internet's open architecture (Open Platform)
- Degradation of service

be flexible and could take into account the unique societal importance of the Internet. In contrast, a "commercially reasonable" conduct standard would consider only the economic perspectives of the contracting parties.[8]

The Commission could establish an Internet reasonable conduct standard also pursuant to authority granted under Section 706.[9] By establishing rebuttable presumptions against conduct that is inconsistent with an open Internet rather than outright prohibitions, the standard would be flexible but would nevertheless allow clear principles to be articulated in advance to market participants. Importantly, the standard would not represent *per se* common carrier regulation because it would both (1) allow individualized negotiation of contractual relationships[10] and (2) would not require BIAS providers to serve all edge providers.

Finally, our organizations would strongly oppose a "transparency only" net neutrality regime. As we noted in our comments, changing broadband Internet access providers is not a remedy if alternative providers are not available or if other available providers engage in the same or similar harmful conduct.

Sincerely,

Jeffrey A. Mitchell
Counsel for AACC, AASCU, ACE, AAU, APLU, ARL, EDUCAUSE, NACUBO, and NAICU

[8] For example, paid priority might be considered commercially reasonable from the perspective of two contracting parties, but it represents conduct that would adversely affect non-contracting parties and thus is not consistent with an open Internet.

[9] *See generally* Comments of AT&T Services, Inc. in GN Docket Nos. 14-28 and 10-127, at 31-39 (Jul. 15, 2014) (*2014 AT&T Comments*) (recognizing Commission Section 706 authority to implement a ban on nonuser-directed paid prioritization for fixed broadband, and to adopt a commercial reasonableness conduct standard for fixed broadband contracts), available at https://ecfsapi.fcc.gov/file/7521679206.pdf.

[10] Examples of contractual areas open for individualized negotiation would include transit services, the geographic location for content hosting, permissible user-directed prioritization arrangements (*e.g*, for telemedicine), bandwidth, and incentives for non-peak traffic delivery. *See, e.g., 2014 AT&T Comments* at 34-35.